DATE: November 24, 1998

CASE NO: 1994-SCA-47

In the Matter of

SUPERVAN, INC. and DONALD RULLO,
Individually and Jointly,
Respondents.

DECISION AND ORDER GRANTING MOTION TO COMPEL, DENYING MOTION FOR SUMMARY JUDGMENT, AND DENYING MOTION FOR DEFAULT JUDGMENT

This case arises under the McNamara-O'Hara Service Contract Act of 1965 (the "SCA"), as amended, 79 Stat. 1034, 41 U.S.C. §§ 351-58 (1998), and the regulations promogated thereunder at 29 C.F.R. §§ 4, 6, 18 (1998). On September 6, 1994, the Department of Labor (the "Department") filed a Complaint against SuperVan, Inc., Special Services Transportation, Inc., Donald Rullo, and Christine Rullo, individually and jointly, alleging that Respondents failed and refused to pay their employees the minimum wages and fringe benefits required by a contract for services to be performed at Lackland Air Force Base. On August 14, 1998, default judgment was issued against Special Services Transportation, Inc. and Christine Rullo.

The findings and conclusions that follow are based upon a careful analysis of the entire record, applicable statutory provisions, regulations, and pertinent case law.

BACKGROUND

The Department served Respondents with the First Set of Interrogatories and First Request for Production of Documents on November 24, 1997. On February 13, 1998, the Department filed a Motion to Compel. To date, Respondents have failed to adequately respond to the Department's discovery requests.

On March 11, 1998, this matter was assigned to the undersigned administrative law judge for the purpose of conducting a formal hearing and issuing a decision and order pursuant to 29 C.F.R. § 6.30. Pursuant to due notice, this matter was initially scheduled to be heard by the undersigned on September 15, 1998, in San Antonio, Texas.

On July 10, 1998, the undersigned issued and granted the Department's Motion to Compel. Therein, Respondents were ordered to file answers to the Department's First Set of Interrogatories and First Request for Production of Documents by July 27, 1998. Respondents were informed that failure to adequately respond to the Department's discovery requests would subject them to sanctions as provided by 29 C.F.R. § 18.6(d)(2).

On August 14, 1998, the undersigned issued a Decision and Order Granting Partial Default Judgment against Respondents Special Services Transportation, Inc. and Christine Rullo. The undersigned also granted the Department's Motion for Continuance as to Respondents SuperVan, Inc. and Donald Rullo.

Respondents SuperVan, Inc. and Donald Rullo filed a Motion for Summary Judgment on August 19, 1998. The Department filed an Answer in Opposition to Respondent's Motion for Summary Judgment on October 30, 1998.

On September 14, 1998, the Department filed a Motion for Continuance and a Motion to Compel Respondents to adequately respond to the Department's First Set of Interrogatories and First Request for Production of Documents. The undersigned issued an Order Granting the Department's Motion for Continuance on September 14, 1998. Therein, Respondents SuperVan, Inc. and Donald Rullo were ordered to respond to the Department's Motion to Compel by September 28, 1998.

On September 28, 1998, Respondents SuperVan, Inc. and Donald Rullo filed an Answer in Opposition to the Department's Motion to Compel and renewed their Motion for Summary Judgment. On October 5, 1998, the Department filed a Motion for Default Judgment. On November 20, 1998, Respondents filed an Answer to the Department's Motion for Default Judgment.

DISCUSSION

A. MOTION TO COMPEL

On September 14, 1998, the Department filed a Motion to Compel on the grounds that Respondents' responses to its First Set of Interrogatories and First Request for Production of Documents were "evasive, inadequate and at times flippant." In support of this motion, the Department provided this office with copies of the discovery requests and responses.

On September 28, 1998, Respondents filed an Answer in Opposition to the Department's Motion to Compel. Respondents argue 1) that the Department should not be allowed to discover information and documents from Respondents in order to establish its claim, and 2) that they have been prejudiced in the preparation of their defense of this matter because "the [D]epartment has dragged its heals for six years on this matter." The undersigned does not find these arguments persuasive.

1. Findings of Fact and Conclusions of Law

Title 29 of the Code of Federal Regulations sets forth Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. *See* 29 C.F.R. § 18. When those rules are "inconsistent with a rule of special application as provided by statute, executive order or regulation," the later controls. 29 C.F.R. § 18 (a). The Federal Rules of Civil Procedure apply to situations not controlled by 29 C.F.R. § 18 or the rules of special application. *See id*.

The Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Service Contracts, applicable in this proceeding, provide that the parties may seek the production of documents and witnesses in the control of the party served. *See* 29 C.F.R. § 6.5. The party served must either object or produce the documents or witnesses to which no privilege is attached within 15 days, if so ordered. *See id.* Additional methods of discovery are available to the parties as provided by 29 C.F.R. §§ 18.13-22.

If a party fails to adequately respond or object to interrogatories or document production requests, the party seeking discovery may move for an order compelling discovery. *See* 29 C.F.R. § 18.21(a). Moreover, 29 C.F.R. § 18.21 (a) provides that "an evasive answer or incomplete answer or response shall be treated as failure to answer or respond." *See id.*

a). Sufficiency of Answers or Objections

Respondents bear the burden of showing that each objection is justified. *See* 29 C.F.R. § 18.6(d)(1). If the administrative law judge determines that Respondents' have failed to sustain their burden, he or she must order Respondents to answer. *See id.* Similarly, if the administrative law judge determines that an answer is insufficient, he or she may either order that the matter is admitted or order that an amended answer be served. *See id.*

After reviewing Respondents Answers to the First Set of Interrogatories and Production of Documents, the undersigned finds that Respondents' responses to the Department's discovery requests are insufficient. SuperVan, Inc., for example, has refused to turn over discoverable documents to the Department in violation of the undersigned's July 10, 1998, Order Granting Department's Motion to Compel. Moreover, several of Donald Rullo's responses to the Department's interrogatories were evasive and incomplete. For example, the Department's Interrogatory No. 4(g) asked:

> In the answer, respondents allege "that Mario Mendiola was responsible for the day to day operations of Supervan, Inc. Furthermore, while Respondent Donald Rullo was President, he was not on a day to day basis involved with the operation of the business of Supervan." Provide a complete and accurate account of the factual basis for those statements including but not limited to: all other reasons supporting your allegation.

Respondents response to Interrogatory No. 4(g) was:

> I wish to reserve the answers to the many questions posed in this paragraph for the time of trial. Again Object [sic] to the form of the questions, the number of questions, broadness, and cumbersome [sic].

Respondents are directed to 29 C.F.R. § 18.14(a) and Fed. R. Civ. P. 26(b)(1) which allow the Department to obtain discovery regarding any matter, not privileged, that relates to a claim or defense in the above-entitled action. Specifically, with respect to the Department's Interrogatory No. 4(g), Respondents have placed information supporting its defense at issue in this lawsuit and are under a duty to provide the Department with the discoverable information. *See* 29 C.F.R. § 18.14(a); Fed. R. Civ. P. 26(b)(1).

Furthermore, Respondents object to the form of several interrogatories. For example, the Department's Interrogatory No. 7 asks:

> For each driver identified in attached Exhibit A, provide the following information:
>
> a. [Whether] the driver performed services on Contract No. F4163692-R0250 and Extension Modification F41636-92-S00003-P00001;
>
> b. [Whether] Exhibit A accurate [sic] reflects each driver's dates of service on Contract No. F4163692-R0250 and Extension Modification F41636-92-S00003-P00001;
>
> c. With respect to each driver listed on Exhibit A[,] if respondents disagree with the information on Exhibit A as whether or not the driver performed services on Contract No. F4163692-R0250 and Extension Modification F41636-92-S00003-P00001, specify any services performed on behalf of the respondents and the dates of those services; and
>
> d. If respondent disagrees with the dates of service for any identified driver, please provide the dates of service for each driver for whom respondent disagrees as to the dates of service; and
>
> e. all documents supporting the allegations.

Respondents response to Interrogatory No. 7 was:

> Object to the form of the question, these are interrogatorial [sic] in nature and not a request for admissions. Interrogatory No. 7 is asking for admission with regard to a and b, c, d and e. ask [sic] for expanded information and documentation. these [sic] are not

requests for production but rather interrogatories.

Though Respondents correctly categorize portions of Interrogatory No. 7 as "requests for admission," as opposed to "interrogatories," this does not preclude Respondents from responding to these discovery requests. Title 29 of the Code of Federal Regulations provides, in pertinent part, that "[a] party may serve upon any other party a written request for the admission . . . of the genuineness and authentication of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact." 29 C.F.R. § 18.20. In short, the undersigned finds that Respondents objections to the form of the questions are not justified.

Respondents also maintain that the preparation of their defense has been prejudiced by the length of discovery process in this matter. Similarly, Respondents contend that they do not have possession or control of the documents the Department seeks to compel. Respondents are directed to 29 C.F.R. § 4.6(g), which requires a service contractor to keep complete wage data on hand and available to the Government for three years following the completion of its contract. *See* 29 C.F.R. § 4.6(g).

In the instant case, Respondent SuperVan, Inc. was awarded Contract Number F41636-92-R0250 and Extension Modification F41636-92-S0003-P00001, effective through September 30, 1992, and September 30, 1994, respectively. As such, Respondent SuperVan, Inc. was required to maintain wage data through September 30, 1997. Moreover, Respondents were properly served the Complaint on Respondents January 3, 1995, and, as such, were also given notice that the records should be preserved. Thus, Respondents are required to produce the employment records detailed in the Department's First Request for Production of Documents.

After carefully reviewing all of the Department's discovery requests and the Respondents' answers and objections to those discovery requests, the undersigned administrative law judge finds that Respondents have failed to adequately answer the Department's discovery requests in violation of the undersigned's July 10, 1998, Order Granting Motion to Compel. Clearly the Department will be prejudiced in its preparation for trial if its discovery requests remain unanswered. Since the Department has substantially complied with 29 C.F.R. §18.21(b), which sets forth the contents of a motion to compel discovery, the Department's motion is granted. Respondents shall file amended responses to the Department's First Set of Interrogatories and First Request for Production of Documents by December 11, 1998, which is within 15 days of this Order. *See* 29 C.F.R. §18.4(a). Failure to do so will subject Respondents to the sanctions as provided by 29 C.F.R. §18.6.

B. MOTION FOR SUMMARY JUDGMENT

Respondents SuperVan, Inc. and Donald Rullo maintain that they are entitled to Summary Judgment on the grounds 1) that they are exempt from the provisions of the SCA by reason of 41 U.S.C. § 356(3) and 29 C.F.R. § 4.118; 2) that they are exempt from the provisions of the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40 U.S.C. § 327 *et seq.* and the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.*; and 3) that the Department's

minimum wage determinations are inaccurate.

1. Standard of Review

The Code of Federal Regulations sets forth the standard for a summary decision in this matter at 29 C.F.R. §§ 18.40-18.41. An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, or material obtained through discovery show that there is no genuine issue of material fact that remains to be resolved. 29 C.F.R. § 18.40(d).

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact, which may be discharged by demonstrating "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After such a showing, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *See id.* at 322. All evidence must be viewed in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 261 (1986). Where a genuine issue of material fact does exist, the administrative law judge must set the case for an evidentiary hearing. 29 C.F.R. §18.41(b).

2. Findings of Fact and Conclusions of Law

a). Failure to Cooperate in Discovery

The Code of Federal Regulations also provides that an administrative law judge may deny a motion for summary judgment "whenever the moving party denies access to information by means of discovery" to a nonmoving party. 29 C.F.R. §18.40(d).

Based on the foregoing findings that Respondents have denied the Department access to discoverable information, the undersigned finds it proper to deny Respondents Motion for Summary Judgment pursuant to 29 C.F.R. §18.40(d). Respondents Motion for Summary Judgment is also denied on the following grounds.

b). Section 356(3) Exemption

Respondents contend that they are entitled to summary judgment because 41 U.S.C. § 356(3) exempts them from the requirements of the SCA. *See* 41 U.S.C. §§ 351-58. Section 356(3) provides that:

> This chapter shall not apply to . . . (3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect.

41 U.S.C. § 356(3). Specifically, Respondents argue that SuperVan, Inc. contracted with the United States Air Force to provide "ground transportation" services with published tariff rates for

individuals located at Lackland Air Force Base.

The Department contends that Respondents contracted to provide "taxi and related services" at Lackland Air Force Base, and, as such, that Section 356(3) is inapplicable. The Department cites 29 C.F.R. § 4.118, which provides in pertinent part:

> The Act, in paragraph (3) of section 7 . . . does not, for example, apply to contracts for taxicab . . . service, because taxicab . . . companies are not among the common carriers specified by the statute.

29 C.F.R. § 4.118. Additionally, the Department maintains that the exemption should be narrowly construed against the party asserting its applicability. *See Williams v. United States Dep't of Labor*, 697 F.2d 842, 844 (8th Cir. 1982); *Menlo Serv. Corp. v. United States*, 765 F.2d 805, 810 (9th Cir. 1985).

Neither party disputes the existence of Contract No. F41636-92-R0250 and Extension Modification F41636-92-S0003-P00001 between SuperVan, Inc. and the United States Air Force. Nonetheless, there is insufficient evidence in the record relating to the type of transportation services that Respondents contracted to provide. Thus, summary judgment is inappropriate because there is a genuine issue of material fact as to the principal purpose of the contract.

c). CWHSSA and FLSA Exemptions

Respondents also contend that they are entitled to summary judgment because they are exempt from the provisions of the CWHSSA, 40 U.S.C. § 327 *et seq.* and the FLSA, 29 U.S.C. § 201 *et. seq.* The Department's Complaint, however, does not assert allegations of violations under CWHSSA or FLSA. Any exemptions under these Acts are inapplicable as to the alleged violations of the SCA, 41 U.S.C. §§ 351-58, set forth in the Complaint. Thus, summary judgment is denied.

d). Accuracy of Department's Minimum Wage Determinations

Finally, Respondents argue that they are entitled to summary judgment because the Department's minimum wage determinations are inaccurate. The Department contends that Respondents bear the burden of proving that the Department's minimum wage determination are inaccurate. Respondents state, however, that the documents they need to refute the Department's wage determinations are not in their possession or control.

Title 29 of the Code of Federal Regulations provides that a service contractor must make and maintain complete wage data for each employee subject to the SCA, and must make the data available to the Department for three years following the completion of the contract. 29 C.F.R. § 4.6(g); *see also, Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1179 n.40 (D.C. Cir. 1973). The burden of proof applicable in such situations was explained by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co*, 328 U.S. 680, 687-88 (1946):

> [A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.* If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.[1]

(emphasis added). In the absence of precise records, the service contractor has the burden of producing reasonable approximations of the employees' wage records to rebut the Department's evidence. *See Amcor*, 780 F.2d at 900; *American Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1409 (10th Cir. 1984).

Although Respondents contend that they are unable to produce complete wage records, Respondents received notice of this action within three years following the completion of the contract. Thus, Respondents have the burden of proving that the Department's wage determinations are inaccurate. To date, Respondents have failed to produce wage records or reasonable approximations to rebut the Department's evidence, and, as such, summary judgment is denied.

C. MOTION FOR DEFAULT JUDGMENT

The Department avers that it is entitled to Default Judgment on the grounds that Respondents SuperVan, Inc. and Donald Rullo have failed to adequately respond to the Department's First Set of Interrogatories and First Request for Production of Documents in violation of the undersigned's July 10, 1998, Order Granting Department's Motion to Compel.

The Rules of Practice and Procedure governing proceedings before the Office of Administrative Law Judges, 29 C.F.R. § 18, contain provisions for the imposition of sanctions should a party fail to comply with a court's order to provide discovery. Under 29 C.F.R. § 18.6(d)(2), an administrative law judge may rule, *inter alia*, "that a decision of the proceeding be rendered against the non-complying party." 29 C.F.R. § 18.6(d)(2)(v).

Nonetheless, default judgment is a severe sanction that should be "only sparingly used and only in situations where its deterrent value cannot be substantially achieved by use of less drastic

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[1] Although provisions of the Fair Labor Standards Act were at issue in *Anderson*, 328 U.S. at 687-88, courts have extended the *Anderson* holding to Service Contract Act actions. *See e.g., Amcor, Inc. v. Brock*, 780 F.2d 897, 900 (11th Cir. 1986).

sanctions." *Marshall v. Segona*, 621 F.2d 763, 768 (5th Cir. 1980); *see also, Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 859-62 (5th Cir. 1970).[2] Default judgment is generally reserved for repeated violations of discovery requests or orders, as opposed to the single discovery violation in the instant case. *See id.*

As such, the undersigned believes it would be premature to grant such a harsh sanction at this time. The need for default judgment will depend on whether Respondents fully comply with this Order to Compel, at which time the Department may seek default judgment.

ORDER

IT IS HEREBY ORDERED that:

1. The Department's Motion to Compel is **GRANTED**. Respondents are **ORDERED** to file amended answers to the Department's First Set of Interrogatories and First Request for Production of Documents by **FRIDAY, DECEMBER 11, 1998**.

2. The Respondents Motion for Summary Judgment is **DENIED**.

3. The Department's Motion for Default Judgment as to Respondents SuperVan, Inc. and Donald Rullo is **DENIED**, but may be renewed upon Respondents noncompliance with the Order.

Entered this _____ day of November, 1998, at Long Beach, California.

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DANIEL L. STEWART
Administrative Law Judge

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2 Although these cases address Fed. R. Civ. P. § 37(b)(2), they are instructive because Rule 37(b)(2) is substantially similar to 29 C.F.R. § 18(d)(2).